

1985

Taking Bureaucracy Seriously

Henry Paul Monaghan
Columbia Law School, monaghan@law.columbia.edu

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Recommended Citation

Henry P. Monaghan, *Taking Bureaucracy Seriously*, 99 HARV. L. REV. 344 (1985).
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BOOK REVIEW

TAKING BUREAUCRACY SERIOUSLY

THE FEDERAL COURTS: CRISIS AND REFORM. By Richard A. Posner.¹ Cambridge: Harvard University Press. 1985. Pp. xvii, 365. \$25.50.

*Reviewed by Henry Paul Monaghan*²

"[T]he federal caseload cannot be allowed to grow for long at the extraordinary rates of the past quarter-century without putting an end to the federal court system in its present form." (P. 93).

The Federal Courts: Crisis and Reform can be viewed as not one but two "books." "Book I" (pp. 1-192), which reflects Judge Posner's well-known commitment to the interplay of law and economics, adds to the literature on the explosive and unremitting growth of litigation in the inferior federal courts during the last quarter-century. Noting this situation with alarm, Judge Posner seeks to identify the dimensions of the "crisis," to evaluate some current proposals for reform, and to advance some of his own. "Book II" (pp. 192-340) is quite different. Considerably less reliant upon law and economics, it addresses the substance of appellate judging, from its craft aspects to the principles that should guide judges as they develop federal common law and as they interpret the Constitution and federal statutes.

At first glance, "Book II" seems only weakly related to the concerns engendered by the litigation crisis. But the two books are held together by Judge Posner's central focus: judging in the federal courts of appeals (p. vii). The district courts' docket explosion, elaborately analyzed in "Book I," is of interest principally because of its impact on the institutional dimensions of the federal appellate process. In Judge Posner's view, that process has traditionally been grounded in a widely-shared ideal most generally identified with Henry Hart, Herbert Wechsler, Lon Fuller, and other "Legal Process" academics, and symbolized by Learned Hand's court (pp. vii-viii).³ On this model, federal appellate judges are members of a small, elite, collegial, deliberative, on-going institution: a court of appeals (pp. 226-28). The

¹ Judge, United States Court of Appeals for the Seventh Circuit.

² Thomas M. Macioce Professor of Law, Columbia University.

³ See, e.g., H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958); M. SCHICK, *LEARNED HAND'S COURT* (1970); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978); Hart, *The Supreme Court, 1958 Term — Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

ideal appellate opinion is the result of a "maturing of collective thought";⁴ its hallmark is an adequately reasoned result (pp. 205-07).

The litigation explosion carries with it the increasing bureaucratization of the federal appellate process, a development that severely undermines the institutional premises of the Hart-Hand model. For Judge Posner, this is the development that converts the litigation "explosion" into a "crisis." Curiously, however, Judge Posner does not see that his proposals for reform — based upon a law-and-economics analysis of federal jurisdiction — cannot solve this crisis. By his own analysis, his proposals, fully implemented, would have only a marginal impact on the caseload of the district courts (p. 189). More importantly, Judge Posner's economic analysis of federal jurisdiction is incomplete; there is much more to federal jurisdiction than economic analysis can explain.

Nonetheless, Judge Posner does highlight a crisis: one of theory. As we approach the third century of the federal court system, we do not have a theory of adjudication that adequately takes into account the great institutional changes brought about by the litigation explosion. Judge Posner does not provide us with such a theory, but he helps to clarify the questions and the challenges that the federal judicial system faces in the wake of profound institutional change.

I. "BOOK I": CRISIS AND REFORM

A. *On the Litigation Crisis*

The idea that the volume of litigation threatens the quality of justice in the inferior federal courts is an old one. Judge Posner demonstrates just how staggering the growth in the federal docket has

⁴ Hart, *supra* note 3, at 100; see Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1, 17-19 (1979). Interestingly, Judge Posner expresses a highly controversial and important limitation on the "collegial" model of the federal appellate courts:

[M]any judicial decisions will be based, at least in part, on value judgments, rather than wholly on technical, professional judgments. Decisions so made are by definition not scientific, and therefore not readily falsifiable or verifiable either — and as a consequence not always profitably discussable. (P. 203).

This statement is made in passing, and the qualifier "always" makes evaluation difficult. But, if understood in a strong form, it is deeply troubling. Judge Posner ignores the literature that argues that value discourse does not differ from other forms of discourse, *see, e.g.*, Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, and he does not recognize that values often rest upon controversial factual premises. Most importantly, the whole notion of a sharp dichotomy between value judgments and wholly technical, professional judgments (or, for that matter, between values and facts) is one not easily defended. At least as a matter of principle, questions of value should be "always profitably discussable" among members of elite groups who both wield power and have the time and opportunities for reflective deliberation. I put this as a matter of principle because I recognize that some or all of the members of a court might not be disposed to such discussions.

been during the last twenty-five years. From "the eve of explosion" (p. 62) in 1960 until 1983, "the number of cases filed [annually] in the district courts [rose] from 80,000 to 280,000 — a 250 percent increase, compared with less than a 30 percent increase in the preceding quarter-century" (pp. 63–64). The growth in the courts of appeals is even more pronounced: from 3,765 cases in 1960 to 29,580 in 1983 — a 686% increase (p. 65). Of course, the number of cases filed does not tell the whole story, and Judge Posner addresses the changes in the composition of the dockets of both district and appellate courts. He demonstrates convincingly that, by every measure, a very real increase has occurred in the workload of the judges at both levels (pp. 59–73).⁵

In response to the caseload explosion, the federal judiciary has increasingly taken on the features of a bureaucracy.⁶ The number of judges⁷ has increased somewhat, but Congress has responded primarily by expanding the judges' supporting personnel (p. 97). The number of bankruptcy judges and federal magistrates has been increased and their functions greatly enlarged,⁸ and there has been a large expansion in the number of law clerks, staff attorneys, and externs (law students working as junior law clerks in exchange for course credit) (p. 97). These personnel have profoundly affected the institutional character of the inferior federal courts. Federal court judges, and particularly district court judges, have increasingly become managers who direct, coordinate, and review the activities of subordinates (pp. 103–04).

Judge Posner's special concern is the impact of the caseload increase on the courts of appeals. He holds the caseload increase largely responsible for the precipitous decline in the number and the average length of oral arguments, which are generally valuable to judges (pp.

⁵ Judge Posner includes a few pages on the causes of the litigation explosion, framed in the vocabulary of economics. There has been, he says, both a rise in the supply of rights and a fall in the real price of litigating in the federal courts, arising from inflation and the provision of lawyers for indigents (pp. 77–93). Exploration of this general topic is beyond the scope of this review (and my competence). Noticeably absent from Judge Posner's analysis, however, is any discussion of the relationship between litigation and social change. See Daniels, *Ladders and Bushes: The Problem of Caseloads and Studying Court Activities Over Time*, 1984 AM. B. FOUND. RESEARCH J. 751, 752–54 (discussing this relationship).

⁶ See Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L.J. 1442 (1983); see also Note, *Unnecessary and Improper: The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 94 YALE L.J. 1117 (1985) (discussing the use of judicial conferences to control inferior judges, which can be seen as an effort to rationalize authority within a bureaucracy).

⁷ Congress has authorized a modest increase in the number of judges. For example, in 1960 there were 68 authorized circuit judgeships (p. 99). In 1983, that number had swollen to 132, but even that figure was far less than the 517 that would have existed if the number of judges had kept pace with the increased caseload (p. 99). By late 1984, there were 168 authorized circuit court judgeships. See 28 U.S.C.A. § 44(a) (West Supp. 1985).

⁸ The extent to which Congress can allocate functions within article III tribunals raises constitutional problems, noted but not discussed by Judge Posner (p. 102 n.9).

119-20); for the dominance of law clerks in opinion drafting, with the result that the opinions are all too frequently prolix, unimaginative, indecisive, and less credible (pp. 103-19); and for the increased use of unpublished opinions, a practice that endangers the disciplining function of opinion writing (pp. 120-28). These changes, Judge Posner argues, threaten the quality of justice traditionally administered in the courts of appeals.

Like most commentators, Judge Posner believes that any realistic solution to the litigation crisis must center on restricting the intake of cases at the district court level. Thus, he considers "the most far-reaching proposals that have some prospect of adoption": "raising the price of access to the federal courts; limiting or abolishing the diversity jurisdiction; moving toward a system of specialized federal appellate courts; [and] reforming administrative review" (pp. 130-31). But because none of these familiar proposals "is based on a radical rethinking of the role of the federal courts or would be likely to have more than a limited and temporary effect on their caseload," Judge Posner sets them aside as "palliatives" (p. 131).⁹ Instead, he proposes to re-examine the role of the federal courts "from the ground up" through the lens of an economic analysis of federalism (p. 169). In the end, however, the proposals emerging from Judge Posner's re-examination would fail to reduce the federal caseload any more significantly than the palliatives he dismisses. Furthermore, the proposals improperly

⁹ Judge Posner characterizes the first two proposals as "demand limiting," the last two as "supply expanding" (p. 131). He first discusses the "demand limiting" proposals. By various devices, he would limit the federal subsidy involved in providing access to courts, largely by increasing filing fees to nonindigent plaintiffs. And he makes a strong case for totally abolishing diversity jurisdiction, although he himself shrinks back from that conclusion in favor of a \$35,000 or \$50,000 minimum for the amount in controversy, despite the obvious political difficulties with that solution (pp. 139-47). Judge Posner also considers fee shifting (awarding attorneys' fees to the prevailing party), but the reasons he advances in its favor are not aimed at transferring litigation from the federal to the state system (pp. 131, 136-38). Two-way fee shifting (awarding fees to successful defendants, as well as to victorious plaintiffs) is posited as a good because it encourages settlement by risk-averse litigants. But if the goal of fee shifting is to reduce litigation in the federal courts, it is an awkward and indirect device; it does not focus on an easily identifiable category of cases undeserving of federal jurisdiction. If its goal is to reduce litigation generally by encouraging settlement, that requires a different kind of justification. Compare *Marek v. Chesny*, 105 S. Ct. 3012 (1985) (approving the view that, in order to encourage settlement, an unitemized settlement offer under Fed. R. Civ. P. 68 ought to bar recovery of subsequent attorneys' fees), with Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that settlement "should be neither encouraged nor praised" because it is often coercive and does not accomplish social management).

With respect to the "supply expanding" proposals, Judge Posner thinks it possible to strengthen the appellate process within administrative agencies and thus reduce some judicial review (pp. 160-62). He is unsympathetic to the creation of additional courts with specialized subject matter jurisdiction, largely because he fears that such specialized courts would be captured by one of possibly several warring ideological camps; the current system of decentralized judicial review greatly reduces that danger (pp. 147-60).

delimit the boundaries of federal jurisdiction, because, to my mind, Judge Posner's economic perspective ignores important elements of the federal-state relationship.

B. *The Economic Model*

Judge Posner grounds his analysis on two concepts: rational self-interest as a quality of judges (p. 172),¹⁰ and the wealth-maximizing implications of an economic analysis of federalism. Beginning with the rational self-interest premise, Judge Posner concludes that state judges are less independent of local political influence than their federal counterparts, because federal judges possess "systematically different [and superior] conditions of employment" — mainly, it turns out, the length of their tenure (p. 172). Life tenure secures federal judicial independence directly, because it protects judges "from retribution for unpopular decisions," and indirectly, because "it makes alternative employment less attractive" (p. 172).

This analysis, however, cannot support a categorical distinction between federal and state judges. Many state judges have tenure *de jure* "during good behavior";¹¹ many others have it *de facto*, because by convention they run unopposed for re-election. And it is hard to see any significant difference between those state judges who must retire at age seventy with pension,¹² and the federal judges who must "retire" only at death.

But even if the "conditions of employment" do not suffice to separate federal from state judges in terms of their relative independence, other factors might. This possibility requires that we examine carefully the precise nature of the feared localism distortions. For Judge Posner, these distortions are economic, originating from the wealth-maximizing implications of "Our Federalism."¹³

Judge Posner sees the fundamental goal of federalism as maximizing society's wealth. (p. 174–75). His emphasis is on "cost and benefit 'externalization,' to use the economist's useful term" (p. 175). Federalism maximizes wealth by limiting the decisionmaking of those who would not bear the major costs and experience the major benefits of

¹⁰ Here Judge Posner follows the tradition of Hobbes and Locke, tracing the origins of self-interest as a "legitimate" mode of argument. See M. MYERS, *THE SOUL OF MODERN ECONOMIC MAN* 28–34 (1983). But see *infra* note 31. Nonetheless, Judge Posner makes a potentially indeterminate, but important, concession — that self-interest is not completely explanatory, because "conscience plays a role" (p. 172). Since he does not develop this remark further, there is no occasion here to consider what systemic implications it has, if any, for an economic analysis of law.

¹¹ See, e.g., MASS. CONST. pt. 2, ch. 3, art. I.

¹² See *id.*; cf. THE FEDERALIST NO. 79. (A. Hamilton) (advocating life tenure for judges "[i]n a republic, where fortunes are not affluent, and pensions not expedient").

¹³ The phrase "Our Federalism" is taken from *Younger v. Harris*, 401 U.S. 37, 44 (1971).

their decisions.¹⁴ If either the benefits or the costs are significantly felt outside the state, then there is "an argument" for national action (p. 174).

This substantive conception of federalism is immediately applied to the jurisdiction of the federal courts:

[W]henver the theory would assign substantive *lawmaking* responsibility to federal rather than state government, there is an argument for assigning *jurisdiction* . . . to federal courts.¹⁵ Since state judges can be expected to be less independent of state political forces than federal judges when both are residents of a state adversely affected by federal regulation, a state court may be an unsympathetic tribunal in a case where a federal right has been created in order to correct an interstate externality. (P. 175) (footnote and emphasis added).

This "argument for assigning jurisdiction" is apparently a conclusive one for Judge Posner, since he nowhere describes what a sufficiently strong counterargument might sound like.

Interestingly, Judge Posner recognizes that his analysis "may not, after all, have revolutionary implications" (p. 189). Indeed, fully implemented, it would reduce the docket by only one-fifth, and "would only postpone the ultimate [caseload] crisis a few years" (p. 189). In view of the unremitting increase in the number of cases filed, Judge Posner might just as easily have described his own proposals as "palliatives."

At a deeper level, I find this general analysis of federal jurisdiction unconvincing. Judge Posner moves too quickly from model to actual jurisdiction. His premise is that the dangers posed by wealth-maximizing impulses within the federal system suffice in and of themselves to warrant locating jurisdiction in the federal courts. This style of argument demonstrates the danger of proceeding on the basis of "gen-

¹⁴ This conception of federalism is profoundly ahistorical. The origins of American federalism are historical and political in nature, not the result of a conscious effort to apply "sound" economic theory. Judge Posner is thus to be understood as giving us a new way of thinking about Our Federalism. One can give other, quite different, accounts of the uses of federalism. See, e.g., J. CALHOUN, *A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES*, reprinted in 1 *THE WORKS OF JOHN C. CALHOUN* 109, 199-215 (R. Cralle ed. 1851) (stating that federalism can help ameliorate powerful sectionally based social antagonisms). See generally S. DAVIS, *THE FEDERAL PRINCIPLE, A JOURNEY THROUGH TIME IN QUEST OF A MEANING* (1978) (surveying the history of federalism). For another recent discussion of the economic approach to federalism, see Rice, *Product-Quality Laws and the Economics of Federalism*, 65 B.U.L. REV. 1 (1985).

¹⁵ This sentence should be read with care. If in fact the national political branches do not regulate a subject, even though the dictates of economic theory indicate that they should, there is no basis for federal judicial intervention. Federal courts have no general warrant to displace state laws that have interstate externalities. See, e.g., *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (refusing to invalidate state law imposing out-of-state burden).

eral assumptions which have not been sufficiently verified."¹⁶ There is a need for hard data on the extent of state court bias against federal statutes, such as environmental laws, that impose clear in-state burdens.

But even if one accepts as a working premise that state courts will be hostile to burdensome federal legislation, it takes a considerable leap to assume a similar localism bias when the federal law only confers benefits upon the state. Consider, for example, Judge Posner's use of the concept of externalities as an argument for exclusive federal jurisdiction over tort suits against the United States:

If a postal van runs down someone and the victim can sue the Postal Service in his own state's court, then the judge, to the extent he considers himself an agent of the state rather than of an impersonal "law," will have an incentive (of which he may be quite unconscious) to resolve doubtful questions of fact and law against the Postal Service. The costs of any judgment against the Postal Service will be borne by the federal taxpayer and thereby spread throughout the nation, but the benefits will be concentrated in the state. (P. 177) (footnote omitted).

The federal government may be the victim of prejudice here, but it seems more likely to be of the "deep pocket" rather than of the greedy "localism" variety. In any event, the question of bias raised by Judge Posner's model is empirical, and we lack the data to answer it adequately.

Judge Posner's jurisdictional analysis is not only unpersuasive, it is incomplete. He does not discuss the appropriate scope of the statutory and judge-made limitations on federal judicial intervention in state affairs, such as the anti-injunction acts and the various abstention doctrines.¹⁷ Are they all to be rejected to the extent they rest on premises inconsistent with the wealth-maximizing implications of Our Federalism?¹⁸ If not, Judge Posner must provide us with a far richer account of federalism than he offers here.¹⁹

At the core of Judge Posner's theory of federalism is a highly controversial characterization of the state court judge. He insists that state judges must be viewed realistically, free from "the pieties of

¹⁶ Yntema, *The Jurisdiction of the Federal Courts in Controversies Between Citizens of Different States*, 19 A.B.A. J. 71, 75 (1933).

¹⁷ See generally C. WRIGHT, *THE LAW OF FEDERAL COURTS*, ch. 8 (4th ed. 1983).

¹⁸ For example, the Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1982), channels commerce clause challenges to state tax laws into state courts. See *Tully v. Griffin, Inc.*, 429 U.S. 68 (1976). By definition, such challenges involve weighing costs potentially felt outside the state. Under Judge Posner's analysis, then, federal courts would adjudicate these cases.

¹⁹ Judge Posner explicitly concedes that his externalities theory cannot "explain anything like the whole of" the modern jurisdictional expansion of the federal courts (p. 179). Conceding the problem, however, does not solve it.

federalism" that emphasize the state judge's duty to enforce federal law (p. 171). But the portrait he paints of the state court judge is, to my eyes, both inaccurate and incomplete. Judge Posner's state judge apparently has no relevant biases of his own concerning the policies of federal law, except for those generated by his identification with local political interests. The precise nature of his bias is unclear and depicted in a variety of ways (pp. 175, 177), but, in the end the state judge seems simply to mirror his local environment, sometimes consciously, sometimes unconsciously (p. 177). His robes and his oath notwithstanding, the state judge seems no different from other state actors. Like them, he reacts to the wealth-maximizing incentives in the federal system, avoiding costs and seeking to capture benefits.²⁰ We are never told, however, how great a force economic incentives exert upon state judges. Is the force significant only in "close cases," or in most cases? Is it applicable to law declaration as well as to fact finding? Is it counterbalanced in any way?

These defects in Judge Posner's depiction of the state judge become most apparent when he considers local prejudice not grounded in the economic implications of federalism. Judge Posner recognizes that there are other forms of local prejudice, both sociological and psychological, that may work against the vindication of federal policy, as the whole history of race discrimination has taught us (p. 180). But his federalism model is wholly unable to deal with such threats to federal policy.

This inadequacy in Judge Posner's economic model leads him into deep difficulties. In a cryptic paragraph, he acknowledges that in general the effects of denying federal constitutional and statutory rights "will be experienced overwhelmingly by state residents" (p. 180). Nonetheless, he seeks to preserve federal jurisdiction in, for example, sex discrimination cases by resorting to the asserted greater political independence of the federal judiciary (p. 180). This independence, he argues, renders federal judges better suited to the job of protecting the rights of those who "lack effective political power in the state" (p. 180).

In a later paragraph, however, Judge Posner suggests a quite different conclusion:

With regard to many, though not all, noncriminal civil rights cases, the argument for federal jurisdiction is also weak. It is no longer true that blacks or Jews or Orientals or even American Indians constitute "discrete and insular minorities" despised by a politically, economically, and socially dominant majority of white Protestants — there is

²⁰ Moreover, it is worth noting that deciding whether a particular cost or benefit should be classified as an externality is by no means problem free, at least as a general matter. See Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 291-93 (1985).

no such dominant majority — or that these groups lack political power and representation in the judiciary. Title VII cases probably would not be decided much differently today in state than in federal courts. The time may have come to stop thinking in terms of stereotypes that, however descriptive of the attitudes of some state officials decades ago, ignore the peaceful but profound social revolution that has occurred since the mid-1960's. (P. 188) (footnote omitted).

Judge Posner cannot have it both ways. First, he abandons his economic theory in order to argue for federal jurisdiction in many civil rights cases. Then, he asserts as an empirical matter that title VII cases would not come out "much differently" in state courts. Moreover, I find it incongruous that Judge Posner, who assumes that state judges are hopelessly prone to economic parochialism, can confidently conclude that these same judges are completely free of religious or racial parochialism.²¹

At best, Judge Posner's wealth-maximization analysis isolates one of the many forms of bias against federal policy. But it is not clear that he has identified the most significant form of localism bias, either historically or currently. Judge Posner's failure to give any meaningful account of potential noneconomic bias against federal policy in the state courts is a serious defect. The fear of such bias has always figured as a prominent, albeit by no means unique, justification for federal court jurisdiction.²² Once we take into consideration more variables than simple wealth maximization, any account of the appropriate scope of federal jurisdiction will be far more complex than Judge Posner's.²³ In sum, any exclusively economic account of federal court jurisdiction is unsatisfying because of its failure to consider the important role that political and historical factors have played and continue to play in shaping the appropriate use of the federal courts in Our Federalism.

II. "BOOK II": JUDGING IN THE COURT OF APPEALS

Judge Posner's discussion of the litigation crisis will no doubt draw interest. But the heart of Judge Posner's concerns surface most clearly

²¹ Judge Posner also asserts that state courts can "be trusted to protect the innocent of whatever race, creed, national origin, or income, with exceptions too few and isolated to justify federal judicial intervention" (p. 187). My own view is that, at least at this period in our history, sweeping, system-wide generalizations about state court judges are unhelpful.

²² The fear of state court bias was particularly pronounced during Reconstruction. See *Mitchum v. Foster*, 407 U.S. 225, 238-42 (1972).

²³ Moreover, the subject is not appropriately considered, as Judge Posner does, *sub specie aeternitatis*. The nature and direction of federal court intervention is contingent. In our federal system it has been and should be made responsive to current necessities, of whatever order. The operative considerations involve such diverse and elusive factors as the volume of litigation, the nature and relative importance of the underlying federal interests, and the impact of federal court intervention on state interests.

in Book II. For here it is apparent that, like many other academics (including this reviewer), Judge Posner is in the powerful grip of the traditional, process-oriented model of appellate judging. Accepting the premises of the Hart-Hand model, Judge Posner deplors what he perceives to be a decline in institutional consciousness among appellate judges, including members of the Supreme Court. The evidence is familiar: lengthy and bloated opinions that “seem to be self-indulgent displays performed with little concern for the interests and needs of the audience” (p. 230); excessive numbers of concurring, dissenting, and, in the Supreme Court, plurality opinions; and, finally, “abuse — often shrill, sometimes nasty — of one’s colleagues” exhibited in all too many opinions (p. 232).

These deficiencies — and they are deficiencies — have no single cause. Prolix opinions are the predictable bureaucratic by-product of an increased caseload: law clerks, who increasingly replace judges as the principal authors of judicial opinions, do not have the maturity or experience to write pithy, persuasive opinions. On the other hand, the greater number of nonmajority opinions and the caustic tone of many opinions may arise from the pronounced tendency of some appellate judges to view their role in ideological terms. They seem to view the appellate task as the articulation and enforcement of public values, rather than the deciding of cases.

Judge Posner does not limit his discussion to problems arising from the caseload crisis. Much of Book II surveys a variety of problems perennially facing federal judges. These problems of “quality alone,” which Judge Posner distinguishes from “quantity-induced” problems of quality, include issues of federal common law, statutory, and constitutional adjudication (p. 261). Perhaps because of his very broad coverage, Judge Posner’s effort is rather eclectic, and some of his discussion is unsatisfying.

Judge Posner’s analysis of federal common law adjudication is incomplete. He correctly points out that, to a surprising degree, federal appellate courts are common law courts (pp. 294–315). Vast areas of federal lawmaking, such as the antitrust statutes²⁴ and section 301 of the Labor Management Relations (Taft-Hartley) Act²⁵ involve a delegation of common law power to the courts. He argues that the courts can improve their performance in developing federal common law by using the “simple but powerful tools of economic analysis” (p. 294). However true that may be, he overlooks an important limitation on federal judicial power to develop an economically grounded federal common law: state law. Quite frequently, federal statutes direct the federal courts simply to absorb compatible state law as the operative

²⁴ See, e.g., 15 U.S.C. § 1 (1982).

²⁵ 29 U.S.C. § 185 (1982) (as interpreted in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)).

federal rule.²⁶ Even when no statute directly commands that result, the Supreme Court has shown an increasing tendency to absorb state law to fill in the interstices of federal law.²⁷ Judge Posner's economic analysis cannot account for this important feature of federal common law. Furthermore, his criticism that "federal common law is not a subject taught or (with rare exceptions) written about as such" (p. 323) will come as a great surprise to most teachers of federal jurisdiction.²⁸

Judge Posner's most interesting doctrinal discussion concerns statutory interpretation. He begins with a theory of legislation. "It should be possible," he says, "to classify statutes according to whether they advance the public interest or advance instead the interest of some (narrow) interest group" (p. 265). But having made that dichotomy, he at once concludes that a somewhat richer categorization is necessary and trisects the public interest classification. And so a twofold distinction becomes a fourfold one: public interest, economically defined; public interest in other senses; public sentiment, which resembles public interest legislation but cannot be defended on the usual economic or utilitarian grounds; and finally, narrow interest group legislation (pp. 265-67).

Having set up this fourfold division,²⁹ Judge Posner assesses its significance for judging. He considers its implications for such questions as judicial inquiry into purpose rather than motive, the scope of implied rights of action, and the canons of statutory interpretation (pp. 267-93). But Judge Posner makes no effort to show why his theory of legislation should have any direct consequences for a theory of how courts should interpret legislation. After all, many have argued that, in the interpretation of statutes, judges should proceed on the premise that Congress has enacted the legislation to foster the public interest and not simply to promote private interests.³⁰ Judge

²⁶ For example, Judge Posner cites 42 U.S.C. § 1983 as an example of permitting a role for federal common law, without adverting to the fact that § 1988 contains a broad directive that the federal courts follow the state law as the rule of decision. See Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U. PA. L. REV. 601 (1985).

²⁷ See *Texas Indus. v. Radcliff Materials*, 451 U.S. 630 (1981) (a case Judge Posner finds perplexing (p. 301 n.16)); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *Miree v. DeKalb County*, 433 U.S. 25, 28-33 (1977). But see *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 596 (1973) (refusing to incorporate "aberrant or hostile" state law).

²⁸ Indeed, I myself have written on the subject. See my widely ignored article, *The Supreme Court, 1974 Term — Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

²⁹ The coherence of these distinctions is criticized in Stewart, *Regulation in a Liberal State: The Role of Non-Commodity Values*, 92 YALE L.J. 1537, 1547 n.41 (1983).

³⁰ In the end, Judge Posner seems ready to accept the substance of such a position. He formulates a test with "obvious affinities" (p. 288) to that developed by Professors Hart and Sacks, who argued that, in construing a statute, a court "should assume, unless the contrary unmistakably appears, that the legislature was made up of reasonable persons pursuing reasonable purposes reasonably." See H. Hart & A. Sacks, *supra* note 3, at 1415.

Posner's slightly more elaborate theory³¹ might permit courts to take a more realistic approach toward interest group legislation.³² But this does not avoid the interpretive problem, for the proper judicial attitude toward interest group legislation needs to be grounded in an adequate political theory, which Judge Posner nowhere provides.

Judge Posner touches upon constitutional interpretation only incidentally. He argues that his conception of federalism has implications for substantive due process:

I offer in a speculative spirit the following alternative to natural law as a possible guide to the application of the due process clause: a law that deprives a person of life, liberty, or property in violation of a fundamental social norm *held by most of the nation* denies due process. (P. 194).

Whatever else may be said about this speculation, novelty is not one of its properties. This conception of substantive due process is an old one, and it has been subject to strong attack, most notably by Dean Ely.³³ Judge Posner makes no effort to defend his theory from such an attack.

Judge Posner also insists that constitutional law not only should but does maintain a central distinction between motive and intent, and that courts are restricted to inquiries into intent (p. 267). But this distinction has disappeared virtually without trace in modern constitutional law, and the sole reference Judge Posner advances to support its existence is to a Supreme Court decision that in fact draws a different distinction.³⁴ Furthermore, that decision's refusal to countenance motive inquiry has been explicitly discredited in a later Supreme Court decision.³⁵

³¹ Judge Posner suggests a two-step approach. First, the judge should figure out how the enacting legislators would have decided the case. If this is impossible, he should use the enacting legislators' "conception of reasonableness" to guide his decision (pp. 286-87).

Judge Posner places no reliance on his previous view giving prominence to the dictates of judicial self-interest. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 416 (2d ed. 1977); Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975). He seems to be quietly retreating from the view that judges should honor legislative compromises because of the threat of legislative discipline. Curiously, Judge Posner has nothing to say on the important question of the appropriate allocation of authority between courts and administrative agencies in statutory interpretation. See Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985).

³² When legislation reflects a compromise between opposing interest groups, Judge Posner argues that the judge's task is to follow the lines of the compromise, not to implement "the purposes of one group of legislators" (p. 289).

³³ See J. ELY, *DEMOCRACY AND DISTRUST* 63-69 (1980); see also Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 369-72 (1981).

³⁴ Judge Posner cites (p. 267) *Palmer v. Thompson*, 403 U.S. 217 (1971), but that case draws a distinction between motive and effect, not motive and intent. See *id.* at 224-25.

³⁵ In *Washington v. Davis*, 426 U.S. 229 (1976), the Court virtually overruled *Palmer's* refusal to engage in motive inquiry. See also *Hunter v. Underwood*, 105 S. Ct. 1916, 1920-23

Finally, Judge Posner contends that rationality review should not be applied to interest group legislation: "[l]egislation passed on behalf of an interest group typically will flunk any test of rationality other than self-interest" (p. 274). There may be good reasons for eliminating the rational basis test, but this isn't one of them. All the court need say is that it will accept the outcome of any interest group struggle so long as it can see that the net result squares with some plausible vision of the public interest.³⁶ It is, after all, no novel insight — particularly to the disciples of Adam Smith — that private interest can advance the public weal.

III. THE END OF THE OLD ORDER

For me, the importance of this work lies not in Judge Posner's analysis of the litigation explosion or in his comments on doctrinal matters. Judge Posner has a deep concern, perhaps only partially conscious, that the institutional changes brought about by the litigation explosion are dissolving the Hart-Hand vision of federal appellate judging. The transformation is not complete, of course. Indeed, on one plane, things seem pretty much the same: cases are brought and disposed of, appeals are taken, briefs filed, opinions rendered. Nonetheless there have been profound changes. As we approach the two hundredth year of the federal court system, the courts of appeals can no longer be viewed as essentially small, intimate, collegial clubs of scholarly gentlemen-judges. Hand's court had six judges;³⁷ it now has thirteen,³⁸ as well as retired and visiting judges.³⁹

But does this change constitute a crisis, or does it signify only that the institutional dimensions of the administration of justice in the federal appellate courts are different from before? Increasingly, justice will be administered by a bureaucracy. For Judge Posner, the resulting changes are for the worse — the old Hart-Hand model is far more powerful and attractive than a vision of the courts of appeals as just another bureaucracy. Thus while Judge Posner is content to prescribe

(1985); *Wallace v. Jaffree*, 105 S. Ct. 2479 (1985). Implicitly, these cases follow the argument of Dean Ely that no acceptable line exists between motive and purpose. See Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1217-21 (1970). Some of the cases and literature are reviewed in Binion, "Intent" and Equal Protection: A Reconsideration, 1983 SUP. CT. REV. 397.

³⁶ See Monaghan, *supra* note 33, at 369-72.

³⁷ See M. SCHICK, *supra* note 3, at 219-46. But even in this court there were acrimonious interchanges, particularly between Judges Clark and Frank.

³⁸ See 28 U.S.C.A. § 44(a) (West Supp. 1985).

³⁹ Judge Posner rightly sees how the wide use of visiting judges impairs the institutional premises of the Hart-Hand model (p. 101). On visiting judges in the Second Circuit, see Feinberg, *The Office of Chief Judge of a Federal Court of Appeals*, 53 FORDHAM L. REV. 369, 375 (1984).

an infusion of new district judges to meet the litigation overload in the district courts (p. 99), a similar solution for the courts of appeals is unthinkable because the federal appellate process would thereby become unmistakably bureaucratic. Bureaucratization of the courts of appeals would signal the total collapse of the Hart-Hand model. Unsurprisingly, the major solution to the increased caseload has been to make greater use of supporting personnel. But, as Judge Posner persuasively argues, even this route will, at some point, result in so much bureaucracy that much of the essence of the Hart-Hand model will be lost.

And so there is a crisis in the federal courts of appeals — a crisis of theory. The Hart-Hand model no longer fits the facts. We lack a theory of the nature of appellate courts that satisfactorily takes into account the great changes that have occurred in the last quarter-century.⁴⁰

What this crisis means is by no means clear, particularly for those not brought up on the old model. Litigants and their lawyers can function in a system for a long time after its intellectual underpinnings have eroded. Moreover, the Continental legal systems have many of the characteristics of a bureaucracy, and the litigants are perhaps no worse off than their American counterparts. Indeed, as Judge Posner observes (pp. 95–96), there has been no appreciable lengthening of the time between the filing of a case in federal district court and its disposition in the court of appeals. But, in our culture, one can expect that the increasing bureaucratization of the court of appeals will have an internal impact. Those courts will become far less attractive to persons of superior talents (p. 99). In a large bureaucracy, not only are most of the attractive features of Learned Hand's court gone, but it is hard to make one's mark. The time may come when it is less desirable to be a circuit judge than a Chicago Law School professor.

Given his preference for the old order, Judge Posner's fundamental conservatism in advocating jurisdictional reform is striking. His version of an economic model constrains his options, for it does not allow the needed drastic surgery on the intake processes of the district courts. So far as I can see, what is left of the Hart-Hand model of the courts of appeals can be maintained, if at all, only by sacrificing

⁴⁰ This problem is, in fact, even more acute in the district courts. The cumulative nature of the changes that have occurred in the district courts make the whole concept of "judging" in those courts quite remote from what it was but a quarter of a century ago. The federal district judge can no longer be seen as a solitary stalwart doing all or most of his own work. Nor in an era of complex class actions and structural injunctions is it possible to see him in the role of "umpire," resolving disputes by passively reacting to the litigants' inputs and awarding only limited, narrow remedies. Increasingly, the district judge is a manager both in the court room and in chambers. See J. RESNIK, *MANAGERIAL JUDGES* (1982); FISS, *The Supreme Court 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

those courts' traditional "corrective function";⁴¹ that is, by eliminating appeals as of right, at least over large categories of cases, including criminal appeals. In the near future, the defenders of the Hart-Hand model may need to assert their preference for discretionary review over some review as of right and thus will inevitably emphasize the lawmaking rather than the corrective function of the courts of appeals (p. 13).

IV. CONCLUSION

The Federal Courts: Crisis and Reform is written for a general readership and has much to offer that audience. *Federal Courts* is always rational, even-handed, and fair-minded in its approach. As a specialist, rather than a general reader, I find deeply attractive the Hart-Hand model that Judge Posner draws upon. Yet, I find some parts of the work unsatisfying. As a general matter, Judge Posner's propensity to conceptualize problems in the language of law and economics is troublesome, particularly when he does so casually and in passing. To recognize that ideas can be expressed in more than one "language" is not to concede that languages are fungible. Language is not neutral, and thus the choice of a specific language can bias perception and understanding.⁴²

Moreover, both "books" have their faults. "Book I" is in major part simply cumulative of our understanding of the litigation crisis. It lacks the elegance and range of Judge Friendly's well-known work.⁴³ In addition, its proposals for reform are unlikely to halt the flood, and they proceed from an excessively narrow view of federal jurisdiction. "Book II" contains interesting reflections on the principles

⁴¹ One appeal as of right "assures litigants that the decision in their case is not prey to the failings of whichever mortal happened to render it, but bears the institutional imprimatur and approval of the whole social order as represented by its legal system." See P. CARRINGTON, D. MEADOR & M. ROSENBERG, *JUSTICE ON APPEAL* 2 (1976).

⁴² Moreover, a language can impoverish understanding when the vocabulary chosen is not rich enough to capture the central dimensions of the subject under consideration. For example, Madison's "political truth" that "[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny," *THE FEDERALIST* NO. 47, at 324 (J. Madison) (J. Cooke ed. 1961), is "economically defined" by Judge Posner as a point about the "costly form" of monopoly with respect to political powers (p. 265). The defect usually associated with monopoly is the danger of output reduction coupled with price increases. It is hard to know whether political "outputs" are reduced by the concentration of political power. More importantly, it is not that separation of powers cannot be formulated in the terms chosen by Judge Posner, but that the formulation is impoverished. This economic translation fails to capture any notion of tyranny and oppression. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 150-51, 446-53 (1965). The human condition cannot meaningfully be expressed simply in terms of a calculating quest for economic efficiency.

⁴³ H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* (1973).

of federal appellate judging. But there is a random quality to the topics discussed, and some of the discussion strikes me as having been inadequately thought out, while other parts disclose an insufficient familiarity with the subject matter.

But for me, what Judge Posner captures better than anyone else is the internal point of view, the impact of institutional change on the courts and the judges themselves. The litigation explosion threatens to transform the traditional institutional characteristics of judging in the courts of appeals. This transformation in turn requires that we rethink long-held assumptions about the nature and theory of appellate judging. Judge Posner's book is a contribution to that effort.